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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

~~No. 952~~ 70-36

CHARLES R. PERRY, ET AL.,

Petitioners,

vs.

ROBERT P. SINDERMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE.

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PETITION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF.

Now comes the American Federation of Teachers by its General Counsel, John Ligtenberg, and petitions the Court for leave to file a brief as *amicus curiae* in the above captioned cause and in support thereof states as follows:

1. The American Federation of Teachers is a union of teachers affiliated with the AFL-CIO. The overwhelming majority of its members teach in the public schools. The American Federation of Teachers is composed of approximately 1,000 locals located throughout the United States with more than 250,000 members. Of the 1,000 locals ap-

proximately 200 are local unions at the college and university level.

2. The American Federation of Teachers and its local unions and many of its members have been involved in much litigation throughout the United States concerning dismissals of teachers. Many of these cases have been filed in United States District Courts under Section 1983 of the Civil Rights Act, and others are being considered. The American Federation of Teachers has traditionally provided financial assistance for the defense of members whose employment is terminated.

3. The American Federation of Teachers is deeply interested in the case at bar, as the decision of this Court in the case at bar will have a substantial effect upon the rights of its members, and may well have decisive effect upon many of these cases.

4. A request has been made of the attorneys representing the appellant and appellee seeking their consent to the filing of a brief *amicus curiae* by the American Federation of Teachers. Both have indicated their consent and have filed copies of their consent with the Clerk of this Court.

WHEREFORE, petitioner asks leave that its brief *amicus curiae* may be filed with this Court.

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BRIEF OF AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE.

INTRODUCTION.

This case is a sequel to *Pickering* v. *Board of Education,* 391 U. S. 563 (1968). The rights asserted by the plaintiff include not just free speech but the right of association. The chief distinctions are that defendants appear to deny they interfered with plaintiff's rights and the case comes to this court via 42 USC 1983 rather than by way of a review of a hearing by a school board.

The brief in behalf of the teacher is quite thorough and

requires little amplification. The American Federation of Teachers will limit its remarks to those matters which its experience has taught require special emphasis.

ARGUMENT.

I.

"EXPECTANCY OF EMPLOYMENT" IS IRRELEVANT IN CASES CHARGING DISMISSAL FOR THE EXERCISE OF FIRST AMENDMENT RIGHTS.

Plaintiff Sindermann like most of the two million public school teachers in the United States signed a one-year contract, taught a year, signed another contract and repeated the process until he was advised in the spring of 1969 that there would be no more contracts. Traditionally, teachers who found themselves in this situation were advised by school administrators, fellow teachers and lawyers that if they had not achieved "tenure" and if the notice was timely there was no recourse to any court to determine whether the termination was justified or not. This was generally considered to be the case even if the teacher believed he was not retained because of exercising freedom of speech or asserting other constitutional rights.

Thus there has been, and still is, an absence of state remedies available to non-tenured public school teachers who wish to challenge their non-retention by school officials.

This case thus presents two matters for consideration (1) the substantive constitutional rights of teachers who are not protected by tenure laws; (2) the procedural rights of teachers who are not protected by tenure laws.

The Court of Appeals in this case as well as in other cases held that the tenure status of plaintiff is irrelevant for purposes of defining a cause of action under 1983 for violation of substantive constitutional rights. Citing its

own decision in *Pred* v. *Board of Education*, 415 F. 2d 851 the Court stated:

> "Equally unpersuasive is the related argument that since there is no constitutional right to public employment school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any rights protected by § 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractual one, nor could it be since no right to reemployment existed. What is at stake is the vindication of constitutional rights—the right not to be punished by the State or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendment rights." 415 F. 2d at 856.

This statement of the law is consistent with *Keyishian* v. *Board of Regents*, 385 U. S. 589, 87 S. Ct. 675 (1967) wherein this Court held that a non-tenured teacher cannot be denied employment because of the exercise of First Amendment rights.

The same position has been taken in several circuits. The First Circuit in *Drown* v. *Portsmouth School District*, 435 F. 2d 1182 (1970) held in regard to a non-tenured teacher:

> "Nevertheless, there is no doubt that appellant has an interest in being rehired sufficient to prevent the school district from not doing so for constitutionally impermissible reasons."

Likewise *Johnson* v. *Branch*, 364 F. 2d 177 (4th Cir. 1966); *Rolfe* v. *County Board of Education*, 391 F. 2d 77 (6th Cir. 1968); *McLaughlin* v. *Tilendis*, 398 F. 2d 287 (7th Cir. 1968); and *Smith* v. *Board of Education* (8th Cir. 1966), support this analysis.

The appellants in this case indicate strong reliance upon one case which appears to depart from this analysis, *Jones* v. *Hopper*, 410 F. 2d 1323 (10th Cir. 1969). See also *Parker* v. *Board of Education*, 348 F. 2d 464.

These courts speak in terms of "expectancy" of continued employment. They appear to require that the teacher shall, as a condition precedent to a cause of action, prove that he had an expectancy of continued employment.

That expectancy of employment has some relevance cannot be disputed. However, it is but one aspect of a § 1983 case. By way of example, if 30 teachers of approximately the same competence apply for 10 positions it is apparent that 20 will be denied employment and that none of the thirty can prove an expectancy of employment as to himself. If the employer tells one of them that he will not even be considered because of the teacher's political views or associations, it is apparent that there has been an infringement of basic rights. However, the teacher could not prove that he would have obtained the job. The school officials in this case suggest that such a teacher could not prevail in a claim under § 1983 although there had been a clear infringement of constitutional rights. This proposition is contradicted by a clear majority of the circuits and by previous decisions of this Court noted above.

The mis-analysis of *Jones* v. *Hopper* seems to be traceable to that court's treating "expectancy of continued employment" as the interest which Professor Jones asserted. Whether "expectancy of continued employment" is constitutionally protected is not essential to a cause of action charging interference with the rights of free speech and association.

II.

RESOLUTION OF DISPUTES CONCERNING TERMINATION REQUIRES A HEARING.

The rule which appears to apply in cases of possible infringement of a teacher's constitutional rights is that such may not be a factor used by school officials in deciding to deny further employment.

This rule is, of course, consistent with the decisions of this Court which hold that restrictions on basic constitutional rights must be narrowly drawn and construed. If it were otherwise the teacher could insure that his political views and associations would not become a factor only by remaining silent.

This, of course, is essentially how cases under the N. L. R. A. are handled. If a person's union activity is a factor in his discharge, the discharge is deemed improper. N. L. R. A. Sec. 8(a)(3). 29 USC § 158(a)(3). See note page 22, Respondent's Brief.

Whether or not there was retaliation by school officials for the exercise of constitutional rights and what form the retaliation took are fact questions which normally cannot be decided without a hearing involving the taking of evidence.

If litigants in § 1983 cases had to depend on clear and direct proof of interference by officials with constitutional rights there would be no causes of action under § 1983. Likewise, the long experience of the N. L. R. B. demonstrates that such disputes can generally be resolved only by the use of circumstantial evidence and the drawing of inferences. Credibility is obviously a crucial factor. Summary procedures thus are not well adopted to resolving disputes as to the reasons for termination of employment.

III.

ALL CASES OF NON-RETENTION REQUIRE A HEARING.

Respondents ably point out the effects of non-retention upon a teacher. We wish only to raise one additional aspect of such decisions. It has long been asserted that an employer can fire a person for a good reason or for no reason. We question the propriety of this proposition when applied to government.

It is untenable for government to act for "no reason." The private owner of property can afford to be arbitrary. Government cannot. Discretion is not caprice. It is supposed to be reasoned judgment based upon facts. See *Wilson* v. *Michigan State Board of Registration*, 228 Mich. 25; *In re Shelley*, 332 Pa. 358; *Arkansas Valley Town Etc.* v. *Atchison, Topeka & Santa Fe RR.*, 49 Okl. 382.

We suggest that it is no infringement upon government to require it to have reasons for decisions. It is certainly no imposition on a school administrator to expect him to be able to say why he is terminating someone's employment. Whether a matter of constitutional law or common sense it is apparent that the minimal right of a government employee is to know why he is not retained and to be given a reasonable chance to correct false assumptions.

IV.

PROCEDURAL DUE PROCESS UNDER § 1983 SHOULD INCLUDE REASONABLE NOTICE AND A HEARING BEFORE AN INDEPENDENT TRIBUNAL.

The Court of Appeals has established a set of guidelines by which institutions should handle termination of teacher employment in order to afford minimal constitution protection.

The procedures appear to be reasonable and fair. However, one important aspect of those procedures deserves serious consideration by this court, namely the tribunal which will resolve disputes. Although the Court of Appeals has directed that such tribunals be impartial, if the institution controls the establishment of the tribunal, there is serious doubt that such tribunals can be impartial. The dissent in *Pickering* at the state level amply points this out. See 36 Ill. 2d 568, 578-585.

For an understanding of the problem, it is necessary to

review how educational institutions decide not to renew a contract. In the typical college there are generally four or more levels of influence. The Department Chairman makes a recommendation to the Dean of a School, the Dean makes a recommendation to the President and the President makes a recommendation to the Board. Special committees at each of these levels may also be involved in the process.

When efforts are made to find out why employment is terminated, lower ranking administrators regularly assert that their power is limited to making recommendations. Those at the highest levels often disclaim responsibility asserting that they merely rely on recommendations of those at the lower levels.

The reasons for termination, if revealed, are couched in language calculated to disguise rather than to communicate the basis for the decision. Hence such slogans as "lack of compatibility with the goals of the university" have a good sound but convey nothing.

The procedures outlined by the 5th Circuit should have the beneficial effect of forcing those who actually make decisions to accept the responsibility for making them. It should likewise have the beneficial effect of requiring the decision makers to articulate reasons in straight forward language and to base those reasons on facts, not speculation or feelings.

As things now stand a set of formal reports from several levels of school administration gives the appearance of substance where there is in fact little or nothing of substance to support a decision.

Allowing school officials to have substantial control over the selection of tribunal members may have the net result of providing judicial approval of this administrative paper shuffling. The institution is likely to appoint panels, the members of which are the products of a system which often substitutes form for substance.

The power to decide a controversy, even though subject to judicial review, is far too important to entrust to one of the participants to a dispute. One of the functions of 42 U. S. C. 1983 is to provide a forum which is insulated from partisan or parochial influences. Unless additional safeguards are imposed by this Court, both the aims of 42 U. S. C. 1983 and the Constitution requirements of due process are in jeopardy.

Whether proceedings are before an administrative agency or a court, a litigant is entitled to a hearing before a fair and impartial tryer of the facts. This Court has so held on numerous occasions: *Tumey* v. *Ohio,* 273 U. S. 510 (1927) 47 S. Ct. 437; *In re Murchison,* 349 U. S. 133 (1959) 75 S. Ct. 623; *Morgan* v. *United States,* 304 U. S. 1 (1938); and *Commonwealth Coatings Corporation* v. *Continental Casualty Co.,* 393 U. S. 145, 89 S. Ct. 337.

The last cited case stated the rule rather simply

> ". . . any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Nor would such a safeguard impinge on the prerogatives of school authorities. The long experience under the N. L. R. A. adequately demonstrates that management discretion can be and is protected. If school administrators, who by their status, possess obvious advantages over teachers when testifying, are fearful of submitting the justification for termination of employment to a truly impartial tribunal then such decisions are suspect.

Probably the greatest single source of difficulty in present day tenure dismissal cases (aside from the cost) is that boards of education sit as tribunals to decide whether to dismiss a teacher that they have already decided to dismiss. The outcome is predictable with 99% accuracy. The net effect is that each side merely attempts to make a

record. In fact, success can be better obtained on review by the teacher if the board was patently unfair.

The impact of termination of employment on a teacher often is overwhelming. He is simply not able to start anew at another institution because its doors are closed to him. If indeed, he is forced out of teaching because of a termination of services then it is in the public interest that the matter be handled in a forthright manner. This can in large part be accomplished by insuring that the panel is actually impartial and not controlled in any way by the participants to the dispute.

CONCLUSION.

The American Federation of Teachers has had long experience with cases involving the termination of the employment of teachers. There can be little doubt that it is in the interest of both educational institutions and teachers for each side to submit its case to a genuinely impartial panel. In such instances the educational institution is more likely to put forward its best case and to avoid reference to petty incidents. On the teachers side, he will be effectively compelled to present his case with minimal resort to challenging the procedures under which the case is tried. The likely result is that disputes can be quickly resolved and matters laid to rest.

Respectfully submitted,

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